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Journal

of the

American Judicature Society

To Promote the Efficient Administration of Justice

CONTENTS

Sustaining Membership List 3

Editorial—Concerning the American Judicature Society 6

Oregon Judicial Council Act Not Repealed 7

Kansas and Connecticut Establish Judicial Councils 8

California Judicial Council in Full Swing 9

Arbitration Wins in California—Full Scope Given in New Law 12

High Efficiency in Cleveland Common Pleas Court—Average Time Between Indictment and Trial Five Days 13

Promoting Original Legal Authorship By Illinois State Bar 14

Regulating Procedure by Rules of Court—By Prof. Clarke B. Whittier ... 15

Arbitration in New York Building Congress 19

The Problem of Trying Issues (Concluded)—By Prof. Edson R. Sunderland . 20

Legal Aid in Criminal Cases Endowed for Chicago Courts 29

Remedy Proposed for Justices' Courts 30

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LIST OF PUBLICATIONS

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Bulletin IV-A—Second draft of so much of the Metropolitan Court Act as relates to the Selection and Retirement of Judges. This applies in large part to courts outside of large cities. Pp. 127.

Bulletin IV-B—Second draft of Metropolitan Court Act. Court organization for large cities. Pp. 94.

Bulletin VI—Organization of Courts, by Roscoe Pound; Methods of Selecting and Retiring Judges, by Albert M. Kales; Local Courts of Limited Jurisdiction (for rural counties), by Herbert Harley. Pp. 68.

Bulletin VII-A—Revised draft of a State-wide Judicature Act. A plan for a unified state court system extending from the Supreme Court to the Justice of the Peace. Pp. 198.

Bulletin X—The Selection, Tenure and Retirement of Judges, by James Parker Hall. Pp. 32.

Bulletin XII—A Report on Commercial Arbitration in England, by Samuel Rosenbaum. Of special interest to commercial lawyers and trade associations. Pp. 72.

Bulletin XIV—Rules of Civil Procedure Supplementary to the State-wide Judicature Act (Bulletin VII-A). Pp. 200.

Bulletin XV—Conciliation and Informal Procedure, with model acts. Pp. 32.

The Municipal Court of Chicago, historical and descriptive. Pp. 43.

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The receipts from Sustaining Members to June 6, 1927, total $1,376. This is about half enough to pay for the normal activities of the Society for the entire year 1927. The list of Sustaining Members, with accretions, will appear in every number of the JOURNAL. This list of contributors affords every person who approves of the purposes and methods of the Society to take a real part in improving justice even though other participation is denied him. The busy lawyer especially will find this a convenient co-operative method for discharging a duty. The Society, on its part, will consider itself a trustee for the expenditure of its funds in the most effective manner possible.

Concerning the American Judicature Society

The members of the American Judicature Society have reason to feel highly gratified because of the success of the plan to create a Sustaining Membership. The first announcement of the plan was made on a sheet enclosed with the last preceding number of the JOURNAL. A second announcement took the form of a circular letter dated May 12. It was explained that all the expenses of the Society had been borne from its inception in 1913 until the present year by two individuals, whose contributions exceeded $90,000. At this time, entering upon the eleventh year of the JOURNAL, the Society receives assistance from the law schools of the University of Michigan and Northwestern University. Since it is free from payment of any salaries, rent or other overhead expense, it seems plausible to believe that the moderate cost of operation will be borne mainly, if not wholly, by its own willing membership.

But, as explained in the foregoing notices, it is desired to continue the policy of a free membership, including receipt of the JOURNAL, for every person interested in the problems of administering justice. We feel that the success of the Society's work to this time is largely due to this policy. The cost of printing six thousand copies of the JOURNAL is only a little greater than one thousand. The merely receptive member, as has been proved frequently in the past, is likely at any time to become an active exponent of some proposal for improving modes of justice.

So those members who are not prepared to contribute, but who wish to continue to receive the JOURNAL as non-paying members and have not yet sent in their names, are again requested to do so. In order to have a live list the Society will have to drop the names of those not heard from before issuing the next number of the magazine. Doubtless this necessary arrangement will considerably reduce our list, but steps will be taken to interest others by sending out sample copies with an invitation to join and it should not take very long to build up a larger membership than formerly, because there are still many persons who are interested in the work but have not been invited to participate. The co-operation of all members in extending the list is earnestly solicited.

No change is to be made in respect to about 1,100 public and law libraries which have received the JOURNAL free.

Only a brief reference to progress in our field is permissible because of the space necessarily accorded to live topics, but something should be said at the beginning of a new volume. By the year 1920 one could say that judicial reform in the United States had attained a programme. It was obvious that in many states, and especially in the larger cities, there was a need for better methods for selecting judges and greater security of tenure. Progress has been made, but owing to the inherent difficulties imposed by constitutional provisions and traditional practices and politics, it has not yet registered in the living law. As stated in the April JOURNAL it appears probable that progress will take the rational form of achieving some form of appointment of judges in the larger cities.

The unification of courts, both in metropolitan districts and in the states, has been a need for a generation or more, though never seriously discussed until this Society began its work. Today it is one of the most promising reforms in the entire field, *de facto* unification being brought about through the creation of judicial councils. Nine states have judicial councils: Massachusetts, Ohio, Oregon,

Washington, North Carolina, California, North Dakota, Kansas and Connecticut. A forceful example of the usefulness of such a unifying body has been afforded by the Council of Senior Circuit Judges in the federal system. It is now obvious that great benefits will flow from such councils and that within a few years they will be considered indispensable in every state judiciary.

The raising of standards for admission to the bar is in a promising condition. Five states have substantially complied with the American Bar Association standard of two years of college training and three years of study with a degree in an approved law school. These states are Kansas, Illinois, West Virginia, Ohio and Wisconsin. There are indications that improvements in this matter will come steadily.

The integration of the bar—meaning organization that will permit of participation in collegiate self-government on the part of all lawyers—is making greater progress than even its early proponents anticipated. The bar is waking up to its collective duties and opportunities. It is not too much to say that a responsible bar is now in its making.

In Alabama, North Dakota, Idaho, New Mexico and California the respective bars have acquired official powers with an all-inclusive membership. In Washington, Oregon and Minnesota a close approach is being made without legislation.

The principle of regulating procedure by rules of court is making rapid headway in professional opinion and gaining ground in legislatures. We are already observing the need for rule-making authority in association with the administrative body called the judicial council. The application of these two principles contains the seeds of every worthy reform in procedure, so that in a brief summary, there is no need to deal with the subject in detail.

The foregoing are the great factors in judicial reform—the orientation of a system to changed needs growing out of increased population and changes in social, commercial and industrial methods. There is greater reason now than ever to persevere, for every step forward yields appreciable benefits and makes the next step easier.

The title page and cumulative index for Volume X will be mailed to all who apply.

Oregon Judicial Council Act Not Repealed

In our April number it was stated that the Oregon judicial council act had been repealed. The statement was premature. A bill to repeal the act had been passed but the bill was vetoed. It appears that a committee had been directed to report bills to repeal obsolete acts, and included the judicial council act because of the opposition to it of an influential legislator. As the act was in no sense obsolete it was not properly within the scope of the special committee. Supporters of the measure rallied and the governor vetoed the bill to repeal. Perhaps this unexpected attack will be beneficial. In Oregon, as in Ohio, there has been thus far little accomplishment by the judicial councils, but this does not prove that they will not have great effectiveness when the operation of the acts is entrusted to judges who appreciate the opportunity to perform a great function. Can it be imagined that if William H. Taft had been head of either the Ohio or the Oregon judicial councils that council would have held back and required prodding or coaxing?

Kansas and Connecticut Judicial Councils

Two More States Now Included in the List of Those That Have Judicial Councils, to Provide Authoritative Study of Administration

Kansas and Connecticut have recently enacted judicial council acts which will be in effect soon. The Kansas act is printed in full in the American Bar Journal for May. It creates a council composed of two supreme court justices, two district court judges, four practicing lawyers and ex officio the chairmen pro tem of the judiciary committees of the legislature. Provision is made for reports to the council as required and an annual report by the council to the governor which shall present conditions in the courts with recommendations concerning court organization and procedure and pertinent legislation. The report shall be circulated among legislators, judges and justices. The council shall receive suggestions from judges, lawyers, officials and citizens concerning faults in the administration of justice.

Connecticut is the ninth state to establish a judicial council. The bill will take effect July 1. The act follows very closely the text of the Massachusetts law, which has permitted of notable work in that state. It makes eligible to the council retired judges, which in Massachusetts permitted the council to be headed most efficiently by Mr. Justice Loring, a retired member of the Supreme Court of Judicature. It provides for four practicing attorneys and not more than one state's attorney, who will be appointed by the governor.

The administration of justice in Connecticut has always been kept on a high plane, both as to personnel of the judiciary and as to procedure. The creation of the judicial council will unify the tribunals of the state, permit of continuous observation of both administration and procedure and provide a body to represent the needs of the judiciary in respect to legislation.

Other states which have judicial councils are: Massachusetts, Ohio, Oregon, Washington, North Carolina, North Dakota, California and Kansas.

Text of Connecticut Act

Section 1. There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the state, the work accomplished and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme court of errors or some other justice or former justice of that court, appointed from time to time by him; one judge or former judge of the superior court, one judge of a common pleas court and one judge of a city court, all to be appointed from time to time by the chief justice of the supreme court and not more than four practicing attorneys-at-law, and one state's attorney, to be appointed by the governor. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Sec. 2. The judicial council shall report biennially on or before December first, to the governor upon the work of the various branches of the judicial system, together with any recommendations it may have with respect thereto. It may also from time to time submit for the consideration of the judges of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable. The clerks of the various courts and other officials thereof shall make to the council such reports, from time to time, as the council may prescribe.

Sec. 3. No member of said council shall receive any compensation for his services, but said council and the several members thereof may be allowed such sum for clerical, travel and incidental expenses as the board of control shall approve.

California Judicial Council in Full Swing

Survey of State's Tribunals Followed by Extensive Plans for Meeting Present and Future Needs—Legislature Appropriates $50,000

The Judicial Council of the State of California was created by the approval of a constitutional amendment at the general state election, November 2, 1926.[1] Its personnel was completed on December 3 and a week later the first meeting held in the chambers of the Supreme Court in San Francisco. With the same facility that marked its organization a program of action was outlined, and a short three months after the initial meeting, statistical information of the greatest significance was embodied in a report to the governor of the state. For the first time in seventy-five years the Commonwealth of California was engaged in a scientific study of its judicial problems.

Under the direction of the Honorable Harry A. Hollzer, Judge of the Superior Court, Los Angeles County, Los Angeles, and a member of the Council, a preliminary survey of the conditions of judicial business throughout the state was undertaken as the first project. A series of questionnaires was addressed to each trial judge within the state—including those of superior, municipal and inferior courts—as well as to their respective clerks, the general purpose of which was to show the condition of the trial calendars at the close of 1926 and the volume of litigation filed and disposed of for the eighteen months preceding that period. So energetically was this work undertaken that a report of the survey was laid before the Council at its second meeting, held in Los Angeles, February 11 and 12.[2]

The survey disclosed that during the fiscal year ending June 30, 1926, 7,200 informations and indictments in criminal cases were filed in the superior courts.[3] There were, moreover, 59,500 ordinary civil law suits and 21,000 probation and guardianship proceedings commenced during the same period. In the juvenile court (a department of the superior court) 11,823 proceedings were

[1]The constitutional amendment creating the council was passed by the state legislature in the session of 1925 and was filed with the Secretary of State, April 24 of that year. (California Legislature, Forty-sixth Session, 1925. Final Calendar of Legislative Business, 251; Statutes of California, 1925. Senate Constitutional Amendment No. 15, Ch. 48, 1369-1370.) The amendment provided that the council consist of the chief justice or acting chief justice and of the following officers assigned by him to sit for terms of two years: one associate justice of the Supreme Court, three justices of District Courts of Appeal, four judges of superior courts, one judge of a police or municipal court, and one judge of an inferior court. The duties of the council were, in general, stated to be: to survey the condition of the courts with a view to improving the administration of justice; to submit appropriate suggestions to the various courts in the interest of the expedition of business; to report recommendations to the governor and legislature at the commencement of each legislative session; to adopt or amend rules of practice and procedure for the several courts not inconsistent with existing laws, and to exercise such other functions as might be provided by law. The proposed amendment appeared on the general state election ballot of November 2, 1926, as proposition number twenty-seven, and, in an election that showed a total registered vote of 1,912,862 and a total vote cast of 1,212,452 was adopted by practically a two to one majority—468,750 for the measure as opposed to 256,252 against—failing to carry in only eight out of fifty-eight counties in the state. (Statement of vote at General Election . . . November 2nd, 1926. Compiled by . . . Secretary of State. Sacramento, 1926. Pp. 3, 68.) The organization of the council was completed on December 3rd, when the Honorable William H. Waste, chief justice of the Supreme Court, and ex-officio chairman of the council, filled the unassigned positions. (First Report of the Judicial Council of California . . . Sacramento, 1927. P. 11. For list of members see Journal of American Judicature Society vol. 10, no. 6 (April, 1927), 171ff.)

[2]The Council does not meet regularly, but only at the call of the chairman or members. Since the February session, meetings have been held in Sacramento March 14-15, and April 14.

[3]There is a superior court in each of the fifty-eight organized counties of California. Forty of these have only one judge, the remainder vary from two each in eight counties to twenty-eight in Los Angeles County—a total of 132 judges. Report, op. cit., 56 (insert).

commenced, and in addition 21,900 suits for divorce and maintenance instituted. On December 31, 1926, more than 21,000 criminal proceedings and in excess of 44,400 civil actions (exclusive of divorce, probate, juvenile and miscellaneous proceedings) were pending in the superior courts in the various counties of the state. Of the criminal cases thus pending 665 were on the trial calendars; of the civil cases, only 12,534. The remainder, in each instance more than two-thirds of the total cases pending—had not at that time been set for trial. Concerning this condition the Council comments as follows:

> It is but natural that, following in the wake of the tremendous growth in population, there should be a vast increase in the amount of litigation demanding the attention of the courts in California. On the other hand, there is a limit to the quantity of litigation which any particular number of judges can handle. In other words, wherever the volume of judicial business has gone beyond such limit, naturally the trial calendars have become congested, resulting in more or less delay and frequently in considerable financial loss to the litigants and to other members of the community. . . . No commercial organization could have survived which had delayed for so long a period of time to investigate its methods of transacting business.[4]

Under the existing constitutional provisions for appellate jurisdiction[5] the volume of petitions for hearing in the Supreme Court has increased to such an extent that one out of every two cases decided in the District Courts of Appeal goes to the Supreme Court on a petition for hearing, and within recent years it has taken the average appeal about two years after filing of the transcript to reach a hearing. The uncalendared cases on December 1, 1926, before the three districts of the Supreme Court, totaled 1,358 and similar cases before the District Courts of Appeal, 772. The report states:

> There is a very marked increase in the number of new appeals due to the constantly increasing amount of business transacted in the superior courts. It is interesting to note in this connection that the amount of judicial business transacted in the various trial courts is in almost exact proportion to the population. In those counties in which the population is increasing in the highest ratio we find the greatest increase in suits filed and litigated matters. The volume of business in the trial courts is as accurately reflected in the number of appeals taken as is the growing population by the litigation in the superior courts.[6]

In view of this survey, the Council expressed the following conclusions: that a complete revision of the sections of the constitution relating to the jurisdiction of the various courts of the state should be undertaken. To provide a basis for possible future action, the council appointed two members a committee to prepare a report looking toward a revision of Article VI of the constitution.[7] On February 26th the committee submitted its findings, recommending extensive alterations through the elimination of obsolete provisions, the rearranging of others, and the proposal of additional amendments.[8] In an effort, moreover, to relieve the courts of excessive jurisdiction, a plan of arbitration looking towards the informal settlement of commercial disputes received favorable recommendation from the Council.[9] A committee also reported on this subject, and while no specific law was recommended, the Council took the position that the principle of enforcibility of arbitration agreements is

[4] Report, op. cit., 12-13.

[5] The appellate courts in California consist of the Supreme Court, organized into three districts—San Francisco, Sacramento, and Los Angeles, and the District Courts of Appeal likewise organized into three districts, designated as first, second and third. The superior court has jurisdiction in all cases at law, involving $300.00 or more, and appeals may be taken to the District Court of Appeal if the case involves amounts of less than $2,000.00. Appeals involving in excess of that amount are allowed to the Supreme Court. (Constitution of the State of California, Art. VI, secs. 1, 2, 4, 5; Report, op. cit., 21.)

[6] Report, op. cit., 13-15.

[7] Report, op. cit., 21-22.

[8] Report, op. cit., Exhibit C. Report on Revision of Jurisdiction, 61-62. The result was Senate Constitutional Amendment No. 12, which, if approved, will bring about extensive changes in the jurisdiction of the state courts.

[9] Report, op. cit., 21. Commercial arbitration has been provided in California since 1872 (California Code of Civil Procedure, secs. 1281-1290) but has not, it seems given satisfaction (Report, op. cit., Exhibit B; Report of the Committee on Arbitration, 57-60) owing to defects in procedure. It may be added that the recent legislature enacted a new arbitration act (Assembly Bill 460).

sound, and that a law giving it effect and properly safeguarding the rights of the parties would be desirable. And lastly it placed itself on record in two important respects: first, as to its political position and, second, with the aid of the Supreme Court, as to its proper place in the judicial system of the state.

In the first instance, the Council was called upon to establish a precedent of a political character. The legislature of 1925 had created a crime commission to study the methods of criminal procedure and to report its findings to the legislature. This report was filed during the opening session of 1927, in conjunction with a number of bills amending and repealing certain sections of the penal code designed to carry the new proposals into effect. The commission also reported that certain of its proposed reforms could be brought about only by altering the state constitution, and it therefore proposed eight appropriate amendments. The governor referred the bills (pertaining largely to procedural matters) to the Judicial Council, with the request that the Council express its judgment concerning them. The results of this consideration embodying certain definite conclusions were subsequently embodied in a short report to the governor. But when the Council was asked through various sources to deal similarly with the proposed constitutional amendments, it found their provisions (with three exceptions) to be concerned solely "with the substantive law and matters vitally affecting the rights of persons charged with crime." Regarding them the Council ruled:

> The Council is part of the judicial system of the state. A competent commission has recommended the adoption of the amendments. The policy of making such changes in the fundamental law of the commonwealth relating to guaranteed rights rests, first, with the legislative department, and, in the final determination, with the people. While the Council is of the view that the amendments, if adopted, will tend to provide for this state a much more efficient system for the swift and certain administration of criminal justice, it has hesitated to let it appear that it was, in any way, attempting to usurp the prerogative of the legislature in passing upon these matters. Individual members of the Council, however, are free to voice their own views in this connection.[10]

The second instance was a constitutional matter. The amendment creating the Council provided that:

> The chairman shall seek to expedite judicial business and to equalize the work of the judges and shall provide for the assignment of any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of judge has occurred.[11]

But there seemed to be some doubt as to the application of this provision to the Supreme Court and to the District Courts of Appeal, and cases arose in which the power of the chairman of the Judicial Council to assign judges of the superior court to sit in the District Courts of Appeal was questioned. The chief contention was that the sections of the California constitution dealing with the Supreme Court and the District Court of Appeals (sections 2, 3 and 4 of Article VI) had not been amended, and the Council was, therefore, without power to assign judges of the superior court to sit thereon, as such assignment would increase the personnel of the higher court beyond that provided for in the constitution. The respondents, on the contrary, contended for a liberal interpretation of the amendment "to permit the mobilization of the judicial power of the state and its application where it was most needed." They emphasized that the assignment of judges to relieve congested conditions was not destroying the structure of the appellate courts created by the constitution, but that such addition was to be regarded as "a mere temporary increase in the personnel designed to carry out the provisions of the

[10] Report, op. cit., 23.

[11] Amendment, op. cit., Sec. 1 (a), subdivision 6.

amendment."[12] The decision was rendered February 28th. It was held that the amendment creating the Council was intended to apply to the entire judicial system of the state, and that the chief justice as *ex officio* chairman of the Council had the power to assign judges of the superior court to assist a District Court of Appeal. Practically, the ruling seemed to give the widest latitude to the Council in dealing with congested business.[13]

Since the completion of the first report, the Council has undertaken further investigations of the condition of the various trial calendars in the superior courts "both for the purpose of mobilizing the man power of the judiciary through the medium of assignments to courts whose calendars are congested and for the further purpose of advising the governor and the legislature respecting the need for additional judges." The recent legislature made provision for the sum of $50,000 for the maintenance of the Council during the next two year period, authorized the sum of $140,000 to meet the state's share of extra compensation for judges assigned to positions carrying higher remuneration than their regular appointments,[14] and in addition made it mandatory upon the clerks of all courts to keep such records and to make such reports as the chairman of the Council might require.[15] The start is auspicious. Indeed, it seems to promise a new day in the administration of justice in California.

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[12]The State Bar Journal (Official Organ, California Bar Association) February, 1927. The Judicial Council in the Supreme Court, 136-137. Also: Langdon v. The District Court of Appeal, 73 Calif. Dec. 306; Fay v. District Court of Appeal, 73 Calif. Dec. 291.)

[13]The decision denied, however, that assigned judges be designated by the District Court of Appeal to sit in independent divisions of that court. Fay v. District Court of Appeal, op. cit., 291, 306.)

[14]The legislature had provided that in case a judge is assigned to sit pro tempore in the Supreme Court or District Courts of Appeal, the extra compensation is paid by the state. In case of judges assigned to the superior court, one-half of the extra compensation is paid by the county, and one-half by the state. Report, op. cit., 24.

[15]Communication from Judge Harry A. Hollzer (Sun Finance Building, Los Angeles, California, May 9, 1927), member of the Council largely responsible for its research activities.

Arbitration Wins in California

California is the fifth state to modernize its arbitration law. The new law, comprising ten amended sections of the code of civil procedure and four new sections, will be in effect July 29. As told in Professor Sly's article in this number concerning the work of the California Judicial Council, a survey of the civil work of the courts revealed congestion in the populous centers, and the Council made a recommendation that the legislature make the arbitration law more effective.

The principal change is in providing that agreements to arbitrate controversies before they have arisen are irrevocable "save upon such grounds as exists at law or in equity for the revocation of any contract." This is the essential feature of the new arbitration laws in New York, New Jersey, Massachusetts and Oregon, as well as in the model act of the American Arbitration Association which was published in the JOURNAL for December, 1926. Provision is then made for enforcing arbitration agreements through summary proceedings in court.

The former act excepted a "question of title to real property in fee or for life" and the new one expressly includes such questions.

The California bar and trade associations will soon have the use of a very effective means for the prompt adjudication of a wide range of disputes which will relieve the courts accordingly.

High Efficiency in Cleveland Court

Under Judicial Supervision Common Pleas Court Makes Record—Average Time in Felony Cases From Indictment to Sentence Is But Five Days

Interesting and encouraging facts are found in the report for 1926 of the Common Pleas Court of Cuyahoga County (sitting in Cleveland). This was the first *nisi prius* court in any large city provided by statute with an executive head. The law creating the office of chief justice was enacted in 1923 and the twelve regular judges of the court chose Homer G. Powell to fill the office for the term of five years. The new regime began in September and a report of the remarkable efficiency achieved was published in this JOURNAL in the following December (Vol. VII, No. 4). The succeeding number carried an address by Chief Justice Powell to the Ohio State Bar Association in which the operation of the court was described.

There are twelve judges elected to this court, sitting in equity, common law and criminal divisions. The chief justice hears all motions pertaining to pleadings. The force is augmented by judges assigned from other counties. Cleveland has a population exceeding 800,000.

The figures for the year 1926 show a continuation of the high efficiency achieved very early under the system of supervision. The increase in cases tried over 1922-1923, the last year of the old regime, was sixty-six per cent. The average cost per case to the public treasury was brought down from $38.25 to $23.39, representing a saving for the last year of $269,459.07 and for the last three years of the sum of $694,951.84. The actual expense for the last year was $424,063.82. The number of cases disposed of in 1922 was 10,923 and in 1926 it rose to 18,128, an increase of sixty-six per cent, and yet the cost for petit jurors was actually reduced by $41,630.12.

Criminal Trials Prompt

The report shows an amazing efficiency in criminal work. With an average time of five days between indictment and trial in felony cases Cleveland undoubtedly leads the entire country. Five weeks would be celerity in most large cities and five months in some.

The report says that usually an offender is arraigned on the day following indictment and tried on the next day, but necessary delay in some cases results in an average of five days. Four years ago four judges were required for these cases, but in 1926 two judges were sufficient. The criminal division has a probation department, criminal record bureau and psychiatric clinic. Reports from these departments are included in the pamphlet recently issued.

One of the factors largely assisting in the smooth operation of the civil side of the court is a highly developed "assignment system." Mr. V. A. E. Dustin, known as the "assignment commissioner," keeps track of the progress of cases in all court rooms and also of the engagements of all trial lawyers. By this means the Common Pleas Court of Cuyahoga County, the Municipal Court of Cleveland and the United States District Court avoid conflicts to such extent that lawyers are unable to plead engagements in other courts at any time. They are saved from waiting, with their clients and witnesses, in court rooms. When a judge begins his charge the assignment commissioner is notified and he telephones to the counsel in the next case at their offices.

Persons interested in judicial effi-

ciency will find much to learn in the Cleveland courts, both Common Pleas and Municipal, which illustrate the absolute necessity for administrative direction. As related in the last number of the JOURNAL the Bar Association of Cleveland is concerned with the problem of improving the mode of selection of judges and of the unification of the two great courts in one.

Promoting Original Legal Authorship

Illinois State Bar Association Encourages Younger Members to Contribute From Their Scholarship, a New Step in Bar Integration

The Illinois State Bar Association, having reached the age of fifty years, announces a new activity—the direct encouragement of legal scholarship among its younger members. Those admitted to practice within the past ten years are invited to participate in a contest by submitting essays on any legal subject. The essays are to be judged by a committee composed of a law school teacher from each of three schools, those of Northwestern, Illinois and Chicago Universities. The association will award prizes aggregating $300 to the writers of the three best papers. The authors will also have their expenses paid to the next annual meeting, where they will read the prize winning essays. The only limitation imposed is that they shall be not too long to be read in twenty minutes. The announcement says that preference will be given by the judges to the essays embodying original thought as against those which show only research.

It will be interesting to observe the result of the announcement. The contest will justify itself in case valuable ideas are presented or in case it stimulates a large number of members to attempt original work. A very high honor will attach to the winners and if the experiment succeeds and becomes an annual feature the honor will doubtless become even greater in future years.

It is to be hoped that a number of the contestants will realize that a fertile field for original work by lawyers lies within the field of judicial administration. Here the problems unsolved are numerous and practical. As a rule the younger lawyers are hesitant about expressing opinions in this field. The more independent thinkers, so far as can be judged from what is said and written, are among the older practitioners and judges. With the encouragement now offered the younger men may well consider the problems of administering justice appropriate for their serious attention. Upon them mainly devolves the responsibility for carrying out projects for reform which so far have been only formulated or suggested.

Fifty years ago the Illinois State Bar Association had eighty-seven members. It has grown to 3,600 and in an appeal for proselytizing the secretary expresses the hope that 3,000 additional members will be added.

Two other innovations have already been made by this association. It has established a pension fund for aged members. It has also instituted a ceremony of admission for applicants who pass the state examination. This is conducted at the Hall of Justice at Springfield, the supreme court justices participating. It is concluded with a dinner of the bench and bar and the novitiates are given a cordial invitation to join the state association forthright. They are made to feel that they deserve public recognition for their high achievement in gaining admission to practice in a state which conforms to the American Bar Association standard requirements. These things all represent steps in bar integration.

Regulating Procedure by Rules of Court

Why We Should Do it and What We Have Done in This Field to the Present Time

By Professor Clarke B. Whittier*

There is a well-nigh unanimous opinion that American procedural law needs reform. Why, then, is it not reformed? It may be answered that genuine reforms are not easily discovered, and that when discovered their concrete formulation, their popularization, and their adoption are not accomplished without much effort. Some well-informed persons, however, are convinced that there is a special impediment to procuring procedural reform, arising from the fact that the enactment of reform lies with the legislatures rather than with the courts.

In support of this view it is urged that many legislators are not lawyers and are unfamiliar with court procedure, its defects and its needs. These men cannot readily understand the bearings or probable effect of a proposed reform. They are timid about changes which they do not comprehend. A center of inertia, and often of opposition, is thus almost predestined. The members of the legislature who are lawyers are more teachable about legal reforms. But they are never drawn from the bench and seldom from that class of lawyers most able to appreciate the need for and probable effects of a proposed reform, namely, attorneys of the widest experience and the highest ability. Most of the lawyers in the legislature are comparatively young men seeking prestige in aid of their practice or older men who have sacrificed their practice considerably to do constructive work along governmental lines. Thus, even the lawyers in the legislature are not those of the profession best fitted to pass on procedural matters. The total result is that much education must be carried on and much inertia overcome before a change in procedure can get a real hearing.

When we add to the natural inaptitude of the legislature for the task their steady preoccupation with other and more pressing matters, we can realize why legal reform fares ill. Again, our legislatures commonly meet but once in two years. This unduly postpones changes in details. For sweeping reforms, two years of consideration would be proper. For subsequent detailed changes or modifications, it is unnecessary. In England changes can be made by the Rules Committee any time after forty days' notice. The atmosphere of politics, personal influence, and trading which prevails in the legislature is not conducive to expeditious or sound legal reform. Finally, the governor's veto has shown itself at any rate in California, capable of blocking wise and well-considered reforms.

On the other hand, the Rules Committee in England is admirably constituted for securing a sound and flexible procedure. It is composed of eight selected judges and four selected members of the lawyers' societies. The selections, aside from four judges who are designated by the statute as ex officio members, are made by the "chief judicial superintendent" of England, the Lord Chancellor. This group of twelve specialists may change almost anything in English procedure. Before an alteration is made, forty days' notice is given to the profession to enable the committee to have the advantage of criticisms and suggestions. The proposed rule can then be at once reconsidered, perhaps amended, or

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reframed and passed. Either house of Parliament may annul it; neither has ever exercised the power. Nevertheless democratic control in the possible case of an abuse of power by a Rules Committee is thus provided.

Advantages of Rules Committee

The Rules Committee, then, as contrasted with the legislature, has many advantages. It is wieldy. It has knowledge of the subject matter and intimate experience with procedure in actual use. It may meet at any time. It can act promptly. It is free from politics. It is not busy with a thousand other matters likely to monopolize its time. With a rules committee endowed with power to act, we might hope for a vast improvement in procedural law comparable to that which has occurred in England. Of course the present rules of procedure, whether the result of decisions, statutes, or prior rules of court, should be capable of modification by the rules committee. A rules committee without power to modify the present statutes or codes governing procedure could do little directly to relieve the situation. If the rules committee devised effective changes and urged them upon the legislature, the proposals would, no doubt, have greater chance of becoming laws than those emanating elsewhere. Nevertheless there would be delay, hard work, probably sacrifice of content in some cases to meet legislative criticisms and a percentage of entire failure. To give the rules committee power subject to legislative power to annul is the better plan.

There are other advantages in the rules committee method. At present we blame the courts and lawyers for faults in court efficiency which are largely the results of legislature-made procedure. The power to reform should be placed in the hands of those whom we hold responsible for the present bad condition. The procedural statutes bind the courts often against their own sense of justice. There is much waste of judicial time in construing procedural statutes, in attempting to make them accomplish justice, in settling mere procedural questions. This time could be saved and the attention of our courts given to determining controversies on their merits. If a disputed construction of a rule of court presented itself, the rules committee could promptly modify the rule to clarify the matter. Mistakes and omissions in the rules could be speedily corrected. We need not await the chance occurrence of a case involving the rule to get an ambiguity cleared. If a rule proved defective, we need not await a biennial legislature to get it remedied.

Having participated in the making of the rules, the judges would understand their purpose. A more sympathetic and intelligent construction might be expected than has been given to the codes of procedure and statutes of the past. It is highly probable that courts would deal rather summarily with technical objections based on the wording, but contrary to the spirit of the rules, and therefore that attorneys would cease to make such objections.

As soon as the courts in England ceased taking errors in the administration of the rules of evidence too seriously, the bar took the hint and stopped relying on this class of technical errors.

What has been accomplished? The story of the adoption of rule-governed procedure in England has been told in splendid fashion by Samuel Rosenbaum, of Philadelphia, in his "Rule-Making Authority in the English Supreme Court." Of course all courts have constantly exercised the power to make rules of court to supplement the statutes, concerning procedure. These rules sometimes settled or modified the previous practice as established by court decisions. Under statutes, beginning in 1833 rules of court were adopted which were quite revolutionary in character. But it was not until 1875

that procedure generally was made subject to rules of court.

Even then the Rules Committee was forbidden to alter the rules of evidence in jury trials, to do away with the oral examination of witnesses, or completely to abolish the jury. However, the rules of evidence have ceased to be the fetish in England that they are in the United States; objections to the admissibility of evidence are seldom heard; the appellate courts are rarely asked to deal with them. No one desires to abolish the oral examination of witnesses. Jury trials have been so limited in England that they no longer cause irritation and disgust. The limitations on the powers of the Rules Committee are therefore, less serious than they at first appear. This method of settling procedure has proved remarkably successful in practice. No considerable number of English lawyers would be found in favor of a return to the legislative system.

In Chapter XVI of Mr. Rosenbaum's book one may read of the spread of this system to the other parts of the British Empire. It must suffice here to say that it has been almost universally adopted. The important exceptions are Quebec, governed by a French code of procedure, Prince Edward Island, and New South Wales. In the last two jurisdictions procedure is approximately what it was in England about 1860, being governed mainly by statutes. These jurisdictions are not up with the procession.

The most interesting conclusion to be drawn from this wide adoption of rule-governed procedure is that it may be used successfully in communities of very different character. Its utility is not confined to urban centers or to densely populated and highly developed states like England. It works in agricultural and sparsely inhabited Canada, in India with its millions of uneducated and undeveloped subjects, and in composite South Africa with Roman-Dutch law as the basis of much of its jurisprudence. It has not functioned as fully in all parts of the Empire as in England. However, taken as a whole, the British experience indicates that the governing of procedure by rules of court may operate successfully in any of our American states. The chief conditions needful for effective operation are (1) a small group of judges who are alive to the crying need for procedural reform and who will study the English system and seriously attempt to apply it to their local needs, (2) a sympathetic attitude on the part of the other judges of the state, so that the system may not be largely destroyed by construction as was code procedure, (3) a bar willing to give the new system a fair trial.

Despite strenuous efforts on the part of the American Bar Association and of many state associations, and despite the almost unanimous approval by our most eminent lawyers, comparatively little has been accomplished toward the reform in this country, as will be apparent from a hasty survey.[1]

In Alabama the Supreme Court was given, in 1915, full power over procedure, including the rules of evidence. There is no clear statement that this power extends to the modification of statutory provisions, but such seems the fair implication. The failure of procedure in Alabama, if any, may therefore fairly be laid at the door of the Supreme Court. In the ten years that have elapsed since the statute was passed, the court has done nothing of importance to make procedure better.

In Colorado, in 1913, the Supreme Court was given full power, with the right to modify statutory procedure. It is true that some changes were made in 1914. They were, however, fragmentary. There was no attempt to overhaul procedure and make it business-like. There was criticism of some of the new provisions, and, indeed, an attempt, though vain, to repeal the law

giving the court power. Slightly modified rules were passed in 1917. In twelve years substantially nothing has been done.

Delaware's highest court has had the power to govern procedure by rules in actions at law since 1852, and the grant was reaffirmed in 1925. The court may even alter statutory procedure. So far, however, the court has left its power substantially unexercised.

Since 1851, the Michigan Supreme Court has had broad powers over procedure. A judicature act of 1915 reaffirmed these. Something was done by the Supreme Court in promulgating the circuit court rules of 1916. Even these, however, took no radical steps. Assumpsit and trespass on the case survived. Some progressive changes in pleading were adopted. Recently, at the instance of members of the bench and bar of Detroit, the Supreme Court has introduced a few minor but valuable innovations—the examination of prospective jurors on the *voir dire by the judge,* the requirement of a disclosure of the alleged defense to prevent a summary judgment, the permission to appellate courts to regulate the order in which they will hear appeals. This is vastly encouraging. The Michigan Supreme Court is beginning to live up to its opportunities. But the legislature still often passes acts concerning procedure, and the Supreme Court has undertaken no general reform.

It has been said that the New Hampshire Supreme Court exercises a power to govern procedure by rules. This seems an over-statement. It does not appear that it has ever attempted to modify a statute or to provide for the procedure in the lower courts. Rule-making power, thus limited, is conceded everywhere.

New Jersey is our brightest spot. The Practice Act of 1912 gave the Supreme Court full power in common law cases; the Chancery Act of 1915 gave the chancellor full power in cases of equity. Rules to be effective until changed were added to each act by the legislature. Hence, in both branches of the law New Jersey is working under rules rather than statutes. The chancellor adopted new chancery rules in 1917; his power has been exercised and in a progressive spirit. The Supreme Court has made no important changes in the rules that accompanied the act giving it power in cases at law. Are our Supreme Courts too busy or too uninterested to function in this matter?

In 1919 the Supreme Court of North Dakota was authorized to pass rules prescribing uniform procedure in the lower courts. But to date, no such rules have appeared.

The power given the Vermont courts in 1915 is apparently restricted and has not been much used.

Since 1916 the Supreme Court of Virginia apparently has had power to pass rules for all courts and to alter statutory procedure. It has done nothing. It has been suggested that this may be due to lack of an appropriation for assistance in the task. It has also been said that the court is waiting until the Supreme Court of the United States obtains power and formulates rules in common law cases in the federal courts in the hope that such rules would be generally adopted and so become uniform.

The Supreme Court of Washington, in 1926, was given full powers. No revision of procedure by the court has so far appeared.

The Supreme Court of the United States has long had power to control equity procedure by rules of court, and has done so. The equity rules of 1913 are a serious and apparently successful attempt by an American court to make genuine reforms in procedure by rules. The Supreme Court also controls procedure in admiralty, bankruptcy, and copyright matters by rules. For ten years there has been before Congress a bill to give the Supreme Court power in

common law cases. So far, it has failed of passage. Persons fearful of the power of the courts—surely the least powerful branch of our government, having neither the purse nor the army—and the same persons or others, feeling that the principle of democracy demands that the people through their legislatures should control procedure, have obstructed it. Democracy, however, is best served when the people act through their most efficient agents for the work in hand.

A priori the Supreme Courts should function better than the legislatures. The legislatures have done badly. The Supreme Courts, however, have thus far done very little. Probably a rules committee or a judicial council serving as such, would be more active and more efficient than a Supreme Court. Our Supreme Courts have their hands full. It is perhaps early, however, to dogmatize about the matter. Some Supreme Court may yet surprise us by its vigorous, thorough, and enlightened revision of its local procedure.[1]

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Arbitration in New York Building Congress

The New York Building Congress is one of the large organizations relying upon arbitration for the adjudication of controversies. It maintains an Arbitration Committee of nineteen members, of which Mr. L. K. Comstock is chairman. This committee maintains "The Arbitration Court of the New York Building Congress" with offices at 101 Park Avenue. Under its auspices and rules arbitrations are heard by arbitrators chosen by the parties from a panel of 100 members of the Congress chosen to embody experience in every branch of the industry. Any other person selected by the parties may serve as arbitrator if approved by the committee.

A book of forty-eight pages has recently been published to explain in detail the operation of the Arbitration Court. It contains twelve pages of questions and answers, the rules, the history of the court, the New York Arbitration Statute, the code of ethics of the Congress, and other matters. The services of the court are available to all persons in the building industry in New York.

The committee recommend the use of a single arbitrator, though the parties may have more if they prefer. They say in the book that the avoidance of litigation, merely because of the presence of an arbitration clause in the contract, is one of the strong recommendations of the system. We quote one paragraph:

> The value of arbitration is not to be judged by the cases arbitrated any more than the value of insurance is to be judged by the number of fires. A clause in a contract to arbitrate a future dispute means that the parties take precautions against the contingency of a public and expensive suit which may injure their business. The value of arbitration is measured, therefore, by the total volume of business which an arbitration clause protects from litigation and ill will and by the promptness, with which the spread of the damage can be checked.

Copies of this informative pamphlet may be had by writing to the above address.

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[1] The following references will guide one who wishes to investigate for himself: Journal of the American Judicature Society, passim; 12 Mich. L. R., 362; 2 Minn. L. R., 81; 13 Mo. Law Bul., 3. Rules of court may be found conveniently in the front of the volumes of the West Publishing Co. reporter system.

The Problem of Trying Issues*

By Professor E. R. Sunderland†

3. Deciding the Issues

We are familiar with two agencies for finding the facts in issue, the judge and the jury. Few problems arise in connection with the first. But the jury has always been hard to use, and it has probably been the underlying cause of three quarters of the procedural difficulties from which our trials suffer.

Nothing else in Anglo-Saxon law has ever made such an appeal to the popular imagination as the common law jury. For centuries it has been the subject of the most extravagant panegyrics. It has been considered the bulwark of liberty, the safeguard of life and property. Everything connected with it has enjoyed its share of praise. Even the number twelve has been seriously referred to as evidence of its sacred character, for Lord Coke says of the jury: "It seemeth to me that the law justly delighteth herself in the number of twelve jurors for the matter of fact, for is that number not much suggested in Holy Writ, as twelve apostles, twelve stones, twelve tribes, etc.?"

But great as has been the reverence for the jury system in England, its native land, we in the United States have placed it on a still higher pedestal by means of our constitutions, state and national.

Perhaps it is a natural consequence of this almost superstitious reverence for the jury as an institution, that its real function and true purposes have often been lost sight of. Excessive zeal for its protection has seriously interfered with its practical usefulness. It has tended to become a fetish, and has often needed nothing so much as to be saved from its friends.

The distinguishing feature of the jury as it developed in England and as it came to us, was the restriction of its jurisdiction to questions of fact. Forsyth, in his careful examination of the origin of the English jury, presents very convincing evidence that such a jury was not known in Anglo-Saxon times and that it did not find its prototype in the early juries of the continent. For, as he points out, the Scandinavian, German, and Anglo-Saxon analogues were tribunals charged with the duty of determining both the law and the facts of the case. Probably in a large majority of the cases which arose in tribal days the law was so simple and the legal consequence following from the facts so definite and clear that there was no need for a separation of the two, but nevertheless the jurors not only found the facts but also determined and applied the law, and were thus both judge and jury combined.[11]

The weakness of such a tribunal lies in its want of technical knowledge. Men temporarily called from the ordinary affairs of life, untrained in the law, are incapable of performing the functions of judges in any but the most primitive communities. Hence the popularly-constituted juries passed away and the judicial power naturally became lodged in courts with a permanent personnel of trained lawyers.

But it has been asserted by the same learned writer that in England, on the contrary, the limited jurisdiction of the juries preserved them from such a fate, for while laws always grow more intricate with the development of social institutions, facts do not greatly change their nature, and twelve casual citizens may be said to be as well qualified to pass upon an issue of fact in the reign of George V as were twelve such citi-

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[11]Forsyth, "History of Trial by Jury."

zens in the reign of Edward III. It is doubtful, however, whether this is strictly true. Life was simple when the jury system was young, but with the steadily growing complexity of society and social practices, the facts which enter into legal controversies have become much more complex. Perhaps it may be said that the growth of education has kept the average juryman abreast of the times in this regard, and the modern facts are no more difficult for the modern jury than were the ancient facts for the juries of olden times. But there is no necessary relation between mental power and the quantity of accumulated information, and the widespread study of books has had only the smallest influence in improving the quality of the human mind.

However, if it be conceded that the jury is as competent today as it was five centuries ago, that would not be sufficient to fully justify its persistence. The crude institutions of primitive society cannot expect to survive amid the increasing exactions of more refined and more critical times unless they can meet the requirements. Why, then, has not the cumbersome law jury, with its tedious procedure, its loose organization, its irresponsible personnel, and its blundering methods, been long since discarded, in favor of an expert and well trained agency for sifting evidence and finding facts? Why did not the judge, with his better training, broader experience and more efficient methods, take over the duties of the jury?

In considering this question it is to be noted, in the first place, that the jury has always been considered not only a finder of facts, but a bulwark against the arbitrary power of judges. The English people feared the courts. They were willing to put up with costs, delays and unsatisfactory service if thereby they could check the encroachments of judicial authority.

Bentham gives a curious emphasis to this idea in his definition of a jury. "Taken in its most extensive sense," he says, "a jury may be defined as an occasional body of non-professional and non-official judges, employed to constitute and apply a check to the power of a professional or official judge, or body of judges."[12] In this view the jury is a social, not merely a legal institution. It is a palladium of popular liberties. For this purpose it must be of the people, bone of their bone and flesh of their flesh. It must be fearless and defiant of official despotism. If it is that, it serves its great social and political end. If the rights of a free people, seriously threatened by the tyranny of the king's judges, can be safeguarded by the institution of a jury, complaints of its inefficiency will fall on deaf ears.

In the volume above referred to, Bentham makes this view of the function of the jury still more striking by an analysis of the distinction between civil and criminal trials. "The beneficial effects of jury-trial are produced in a different shape," he says, "in the civil branch and in the penal. In the civil branch, it is by applying a bridle to arbitrary power in the hands of the judge; in the penal branch, as we have seen, contributing to infuse weakness into the body of the law." Such weakness is necessary in order that the rights of those affected by the laws should not be sacrificed in the interest of those who make them. By the vote of a single juror the hand of the law, when it is deemed to operate oppressively, may be paralyzed. Individual security is thus exalted above governmental power, and it may well be that the jury system has in this way perpetuated the ideals of personal liberty which have now become recognized as the most illustrious product of English political and legal struggles.

But times have changed, and the government itself is now under the absolute control of the people. The judges,

[12]Bentham, "Principles of Judicial Procedure," Ch. XXIII.

if appointed, are selected by the agents of the people; if elected, are selected by the people directly. The need for the jury as a political weapon of defense has been steadily diminishing for a hundred years, until now the jury must find some other justification for its continuance.

We are thus brought to a consideration of the second and sole remaining purpose served by the petit jury, namely, the trial of issues of fact. If this is now its only considerable function, how can it survive the weakness which is certain to attend the performance of difficult duties by untrained and irresponsible persons?

With its characteristic resourcefulness the common law provided a corrective. The judges undertook to give the jury the benefit of their experience and skill by advising them in difficult cases respecting the weight and effect of the evidence. This never went to the length of obligatory instructions on the facts. That would have killed the jury as an institution. But the judges did not hesitate to tell the jury what they believed the evidence had shown, and the jury did not resent it, for it was advice, not a command, and the jury were always expressly informed that if it did not appeal to them as sound they were at liberty to disregard it.

So universally was the propriety and expediency of this doctrine recognized in England that few cases are to be found where it has been questioned. But whenever the point has been raised the rule, as stated has been unqualifiedly affirmed. Thus in the Court of Exchequer, Parke, B., said, in *Taylor* v. *Ashton*,[13] which was an action for deceit, "The learned judge told the jury . . . that he did not think what was proved amounted to fraud . . . but this was no matter of law, it was a mere observation on the fact. . . . And accordingly it appeared the learned judge said, 'After all, it is a question for you to decide, not for me.' . . . But looking at the mode in which it was left to the jury, and considering that the learned judge was not discussing it as a matter of law . . . we cannot say that any wrong observation on a matter of fact, in which we could not concur, is ground for granting a new trial, if it was left as a question of fact for the jury."

In the Common Pleas, in *Davidson* v. *Stanley*,[14] Tindal, C. J., said: "The whole objection amounts to this—that the opinion of the judge was delivered in favor of the defendant. I think it is no objection that a judge lets the jury know the impression which the evidence has made upon his own mind." And Coltman, J., said: "The learned judge seems to have made strong observations; but no stronger than he was justified in making. A large mass of evidence had been given which, though of little weight itself, was of such a nature as might mislead the jury."

In Canada the same rule is liberally enforced. In *Lowenburg, Harris & Co.* v. *Wooley*,[15] complaint was made that the judge had taken the decision of a question of fact away from the jury, but the Chief Justice, speaking for the Supreme Court of Canada, said, "No doubt the learned judge, in his long and exhaustive charge, did strongly comment on the evidence, but that he has a perfect right to do, and I must add, considering the nature of the case and of the evidence adduced, I should have been surprised if the learned judge had not spoken forcibly."

The manifest advantages of such a rule of practice have frequently been pointed out. Thus, so eminent a writer as Judge Pitt Taylor in his work on evidence, says that "it may well be doubted whether in the great majority of instances, it would not promote the real interests of justice, if the judge were temperately to state to the jury what opinions he has formed respecting

[13] 11 M. & W., 401 (1843).

[14] 2 Man. & Gr. 721 (1841).

[15] 25 Can. S. C. 51 (1895).

the merits of the case, and the mode by which he had arrived at his conclusions. The jury would still have the undisputed power of deciding the question as they thought fit, but they would have the advantage of being advised by a man no more liable than themselves to prejudice or partiality whose long experience in courts of justice must of necessity have rendered him far more competent than they can be to unravel the tangled threads of conflicting testimony."[16]

Forsyth, in defending the jury as an institution in civil cases, against the criticism that many wrong verdicts result from the ignorance and prejudice of jurymen, doubts the frequency of such miscarriages of justice because of the double safeguard of judicial counsel and advice and the granting of new trials. "The presiding judge," he says, "has, by the tendency and bias of the remarks which he makes in summing up, the means of influencing and guiding them to a right result; and they have generally the good sense to avail themselves of all the help afforded by his perspicacity."[17]

So much for the development of the English jury. Turning to the United States we find a curious reaction from the sensible and practical views outlined above. At the time when the American Colonies separated themselves from England, the rights of the people were by no means secure against the encroachments of government. The jury was still regarded as an indispensable political weapon, and, when the new government was set up here, it was inevitable that a constitutional bill of rights should be adopted securing forever the right of trial by jury. This was supposed to be no more than a reaffirmance of the constitutional rights enjoyed by Englishmen since Magna Charta, and was not inconsistent with the continuance of that aid and advice which English juries were in the habit of receiving from the judges.

But the American people went farther. Perhaps their experience, as inhabitants of colonies, whose remoteness served as a cloak for tyranny and oppression, made them more sensitive to the possibilities, lurking in the judicial prerogative. At any rate, they conceived the idea of prohibiting judges from advising juries in regard to facts. As early as 1796 this novel doctrine found its way into the Constitution of Tennessee, in the following language—"The judges of the superior and inferior courts shall not charge juries with respect to matters of fact, but may state the testimony and declare the law";[18] and in the same year North Carolina adopted the same rule by statute.[19] In 1822 a similar provision was enacted by the legislature of Mississippi, which was repealed in 1830, but reappeared again in an even more drastic form in the statutes of 1860.[20] In 1836 Arkansas introduced the Tennessee provision into its constitution.[21]

The movement was thus indigenous to the South. It was nearly fifty years before the first Northern state, Illinois, took it up.[22] Then two more Southern states adopted it—Georgia in 1850,[23] and Texas in 1853.[24] Georgia went so far as to prohibit courts from intimating opinions even in equity cases where juries were called in. During the next thirty-five years fourteen more states enacted statutes or adopted constitutional provisions embodying, in various phrases this restriction on the power of

[16]Taylor, "Evidence" (8th Eng. Ed.), Sec. 25.

[17]Forsyth, "Hist. of Trial by Jury," p. 441.

[18]Tenn. Const. of 1796, Art. 5, Sec. 5.

[19]See State v. Moses, 2 Dev. 452 (1828).

[20]R. C. of Miss., 1822, Ch. 13, Sec. 144; Hutchinson's Miss. Code, Ch. 61, Art. 1; R. C., 1880, Sec. 1714.

[21]Ark. Const. of 1836, Art. 7, Sec. 12.

[22]Ill. Rev. Sts., 1845, Sec. 28, p. 417.

[23]Acts of 1850, now appears as Sec. 4863, Ga. Code, 1911.

[24]Acts of 1853, now appears as Art. 2185. Tex. Rev. Civ. Sts., 1925.

judges.[25] That seems to have marked the end of the movement toward legislative and constitutional restrictions on the powers of courts in charging juries. It will be seen that, although most prevalent in the South, it was confined by no geographical lines and restricted to no single period of time. Of the twenty-one states and territories which adopted it, eleven were Southern, four belonged to the Pacific Coast group, two were in New England, and four were in the Central West; and the period covered was almost a hundred years. Of the forty-nine states and territories comprising the contiguous portion of the United States, twenty-eight have never adopted such legislation.[26]

But while considerably less than half the states have enacted legislation on this subject, the courts in about half of the remaining states have by judicial decision adopted the same restriction.[27] The rule, therefore, is now actually in force in two-thirds of the American jurisdictions. Only the federal courts and a minority of the state courts which were unaffected by statute have remained true to the common law.[28]

But even the old guard is threatened, for Congress may pass the Caraway Bill, now pending before it, which prohibits federal judges from commenting on the weight of the evidence. This is being vigorously opposed by the American Bar Association, but seems to be supported by many lawyers. If it is passed by Congress and signed by the president it will still have to weather the storm of a constitutional attack before the Supreme Court of the United States on the ground that it impairs trial by jury. In *Capitol Traction Co.* v. *Hof*,[29] the Supreme Court defined trial by jury as "a trial by twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence." This is very specific and clear language, and it is hard to see how the Caraway Bill could fail to be shipwrecked upon it.

It is hard to account for this widespread departure from the well-settled principles which have always governed the jury trial. The courts which have

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[25]These were in Massachusetts in 1860 (G. S., 1860, Ch. 115, Sec. 5), California in 1862 (proposed in 1861, ratified in 1862 as an amendment to the Const. of 1849), Nevada in 1864 (Const., VI, Sec. 12), Oregon in 1865 (Acts of 1865, see Hill's Laws, 1887, Sec. 200), Colorado in 1867 (R. S., 1867, Ch. 70, Sec. 168), South Carolina in 1868 (Const. of 1868, Art. 4, Sec. 26), Maine in 1874 (Acts of 1874, see R. S., 1903, Ch. 84, Sec. 97), North Dakota in 1877 (C. C. P., 1877, Sec. 248), Florida in 1877 (Acts of 1877, see G. S., 1906, Sec. 1496), New Mexico in 1880 (Acts of 1880, Ch. 6, Sec. 23), Arizona in 1887 (R. S., 1887, Sec. 775), South Dakota in 1887 (C. L., 1887, Sec. 5048), Indian Territory in 1889 (25 U. S. Sts., Ch. 333, p. 783, extending rules of practice of Arkansas to the Indian Territory), and Washington in 1889 (Const., IV, Sec. 16).

[26]Compare 2 Thompson, "Trials," Sec. 2280, which states: "By statute and, in some states also by constitutional provisions, in almost every state and territory, judges are expressly forbidden to charge the jury on questions of fact."

[27]See—Alabama: Andrews v. State, 159 Ala. 14, 48 So. 858 (1909). Indiana: Killian v. Eigenmann, 57 Ind. 480 (1877). Iowa: State v. Philpot, 97 Iowa 365, 66 N. W. 730 (1896). Kansas: Heithecker v. Fitzhugh, 41 Kan. 50, 20 Pac. 465 (1889). Louisiana: Riviere v. McCormick, 14 La. Ann. 139 (1859). Maryland: United Railways & Elec. Co. v. Carneal, 110 Md. 211, 72 Atl. 771 (1909). Michigan: McDuff v. Detroit Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673 (1890), departing from the earlier contrary rule stated in Sheehan v. Barry, 27 Mich. 217 (1873). Missouri: Webb v. Baldwin, 165 Mo. App. 240, 147 S. W. 849 (1912). Montana: Wastil v. Montana Union R. R., 17 Mont. 213, 42 Pac. 772 (1895). Nebraska: Kleutsch v. Security Mutual Life Ins. Co., 72 Neb. 75, 100 N. W. 139 (1904). Ohio: Cincinnati, H. & D. Ry. v. Hedges, 15 Ohio C. C. 254 (1897). Oklahoma: Kirk v. Territory, 10 Okla. 46, 60 Pac. 797 (1900). West Virginia: Harman & Crockett v. Maddy Bros., 57 W. Va. 60, 49 S. E. 1009 (1905). Virginia: Whitelaw, Exec., v. Whitelaw, 83 Va. 40, 1 S. E. 407 (1887). Wisconsin: Buyington v. Merrill, 112 Wis. 211, 88 N. W. 26 (1901), departing from the earlier contrary rule stated in Ketcham v. Ebert, 33 Wis. 611 (1873).

[28]See—United States: St. Louis, Iron Mountain & Southern Ry. v. Vickers, 122 U. S. 360, 30 L. Ed. 1161, 7 Sup. Ct. 1216 (1887). Connecticut: Banks v. Railway & Lighting Co., 79 Conn. 116, 64 Atl. 14 (1906). Minnesota: Bonness v. Felsing, 97 Minn. 227, 106 N. W. 909 (1906). New Hampshire: Flanders v. Colby, 28 N. H. 34 (1853). New Jersey: State v. Hummer, 73 N. J. L. 714, 65 Atl. 249 (1906). New York: N. Y. Firemen's Ins. Co. v. Walden, 12 Johns 513 (1815). Pennsylvania: Leibig v. Steiner, 94 Pa. St. 466 (1880). Rhode Island: State v. Lynott, 5 R. I. 295 (1858). Utah: People v. Lee, 2 Utah 441 (1879). Vermont: Rowell v. Fuller, 59 Vt. 688, 10 Atl. 853 (1887).

[29]171 U. S. 1, 43 L. Ed. 873, 19 Sup. Ct. 580 (1899).

judicially created the doctrine, like the legislatures of the people who have enacted the statutes, doubtless did so in the belief they were preserving inviolate the right of trial by jury. But they have nowhere, so far as the writer's researches have shown, considered the question in a broad way, nor have they, in most cases indicated an appreciation of the fact that they were announcing a doctrine unfamiliar to the common law. Without argument, without examination, without authority they have simply held that an expression of opinion of the facts by the judge invades the province of the jury, and it is therefore error. A few courts have gone farther and justified the restriction on the powers of the judge on the ground that the jury is notoriously so under the influence of the judge that any intimation of opinion on his part would be tantamount to a withdrawal of the case upon that point from the consideration of the jury.[30] But such a view is either unfair to juries or it points out so fatal a lack of independent judgment upon their part as to disqualify them entirely for the duty they are sworn to perform.

As long as the ultimate decision rests with the jury there can be no serious encroachment by the judge. His advice will be taken when it appears to be justified by the evidence; otherwise it will fail of effect. The jury will be quick to see and resent any attempt on the part of the judge to be unfair to either party, and the concurrence of the jury in the advice of the court will be good evidence that his advice was sound. Even so radical an antagonist of judicial usurpation as Bentham recognized this when he said: "In so far as upon what he does or says depends the decision given by the jury—only in so far as what he does and says, has in their eyes the appearance of justice, can he hope to exercise any influence upon the decision they are about to pronounce."[31]

The doctrine that a final decision on the facts from the judge alone is entirely proper and just in a so-called equity case, while the slightest intimation of the court's opinion on any part of the facts is a monstrous and fatal error in a so-called law case, is a phase of legal legerdemain which ought not to be perpetuated. There is no esoteric virtue in the chancellor which fails in the judge. Facts are facts, whether they are investigated on the law or equity side of the court.

Mr. Frank W. Grinnell says in 3 Mass. Law Quar. 357: "I talked with a friend of mine, a few years ago, just after he had served as a juryman for five or six weeks. He said: 'The thing that we could not understand on the jury with which I sat was why the judge did not talk to us more about the facts and the evidence. We knew that he must have some ideas on the subject and, naturally we should have liked to hear what those ideas were so that we could consider them. That is what we would have wanted in making up our minds about anything outside the courtroom, and we could not understand why we should not be treated in the same way inside the courtroom and given such assistance as the judge might be able to give us. There he was, sitting upon the bench all through the trial, listening to the case with us for the purpose of doing justice, and yet he was the only man who did not talk at all about the case in any practical way. I don't know what you lawyers think about it, but I know what I think of such a situation.'"

But aside from the obvious advantages which the jury would gain from the impartial advice of the judge based upon his experience, skill and technical training, the full recognition not only of the right, but the duty of the judge to advise the jury on the facts, would

[30] See Cronkhite v. Dickerson, 51 Mich. 177, 16 N. W. 371 (1883); McMinn v. Whelen, 27 Calif. 300 (1865).

[31] Bentham, "Principles of Judicial Procedure," Sec. 4.

produce amazing results in diminishing the costs, delays, and technicalities of jury trials. Among the most striking of the advantages, the following may be named:

1. *It would reduce the time, strain and scandal in empaneling juries.* Nowhere in the English speaking world are there such exhibitions of judicial ataxia in obtaining juries as in the United States. Why should a judge sit helpless for days and weeks while lawyers wrangle and struggle over the selection of a jury? Why should the court be paralyzed at the whim of contentious counsel, piling up expense on the taxpayers, congesting dockets, delaying justice, and bringing the law into disrepute? Chiefly because the jury is an irresponsible and uncontrolled subject for the lawyer's manipulation. In many cases he does not try to get an impartial jury, but a jury which he can handle. If the judge by his advice can counteract the efforts to prevent a decision on the merits, such efforts will cease. This has been the experience in England and her colonies. Juries are quickly obtained and do their duty well. Justice Riddell of the Supreme Court of Ontario recently said: "I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case, and never but once heard a juryman asked a question."[32]

2. *It would facilitate the introduction of evidence.* The science of special pleading is usually pointed to as the climax of legal refinement, but the science of evidence pays a much greater tribute to the microscopic discrimination of the legal mind. Errors in the admission and exclusion of evidence are not only common but inevitable, and they bring with them appeals, reversals and re-trials. But if the case is carefully analyzed for the benefit of the jury by the judge and the force and effect of the various parts of the evidence is fully explained to the jury, and the judge suggests to them what appear to him to be proper conclusions to draw from it, is not the chance of the jury being misled practically eliminated? By a perusal of the judge's advice and suggestions, it can readily be seen whether the case in its substantial aspects was clearly laid before the jury for decision. If it were, no harm has been done, for cautions from the judge are a reasonably reliable corrective for violations of rules of evidence.

3. *It would enable the judge to exercise much more effective control over the conduct of the trial.* The prevailing American rule prohibits any remarks from the judge, as well during the prior course of the trial as during the giving of instructions, which intimate any opinion he may hold as to whether any fact has or has not been established, as to whether any piece of evidence is entitled to much or little weight, and as to whether any witness or class of witnesses is to be deemed more or less credible. Almost every ruling he is called upon to make during the trial relates directly or indirectly to the evidence. In just so far as he is an active participant in the trial he is likely, therefore, by word or act, to give the jury some inkling as to his own impressions. A word used, a suggestive phrase dropped, an inadvertent failure to properly balance his statements, even a perfectly valid reason given for a ruling, might reveal an opinion. In every sound he utters there lurks the possibility of reversible error. Is it strange, then, that the judge inclines to hold himself aloof from the contest, to sit as an umpire or moderator, rather than as a participant in the proceeding, to let things take their own course as far as he can, and to throw the responsibility for a proper decision of the case upon the parties, the lawyers and the jury?

4. *It would simplify the task of instructing the jury on the law.* It is

[32] 17 Univ. of Pa. Law Rev. 32.

very difficult to prepare a set of instructions which will not be suggestive of matters of fact on the one hand, or be too abstract on the other. The judge must give the jury the law, but he must not intimate opinions on the facts; and yet the rules of law which he gives must be concrete and applicable to the precise facts in evidence. The court must not assume the existence of any controverted fact, must not put in doubt any uncontroverted fact, must not emphasize by special reference, nor minimize by silence, any particular facts; must not call special attention to particular witnesses, must not use ambiguous forms of grammatical expression which may or may not carry suggestive inferences as to the existence of facts. But suppose the court should be permitted to really explain and elucidate the evidence for the jury's benefit. Most of these baffling rules and restrictions would at once disappear.

5. *It would reduce the frequency of resort to that expensive remedy for bad verdicts—the New Trial.*

Many of the grounds for new trial are based upon the manner in which the trial was conducted and upon the justness of the verdict, as related to the evidence. Thus, the admission of improper evidence, the misconduct of counsel in improperly appealing to passion or prejudice or in bringing to the attention of the jury facts which are not proper for their consideration, excessive or insufficient verdicts, and verdicts which are against the weight of the evidence, all constitute grounds of this nature. This doctrine of new trials based upon perverse verdicts sufficiently shows that the jury are not exclusive judges of the facts. Even if they are flattered to their faces by being told so, their exclusive jurisdiction is repudiated behind their backs when their verdicts are set aside as contrary to the weight of the evidence. They are exclusive judges if they decide right, but not if they decide wrong, and the court has the final decision. Of course it may be answered that the court's decision is not final, because the only effect of its action is to send the case back to another jury. But practically there would be little use in going before another jury with the same evidence, if held by the court insufficient, for the case would be shipwrecked on the same rock as before; and if the verdict is set aside as excessive, it would be a foolish lawyer who would tempt providence by asking another jury for the same amount.

If, then, the court has the power, for all practical purposes, to prevent parties from obtaining judgments upon perverse verdicts, why should it not have the power to help juries to avoid such verdicts? Why must the court sit mute, allow the verdict to be rendered without a word of warning, and then destroy it? A supervising architect does not stand silent and allow a building to go up in a manner he cannot approve, and when it is completed at much cost, order it demolished and built over from the beginning. An executive having the veto power on legislation, if he felt any interest in obtaining needed laws, would not refrain from all comment upon pending bills until after the legislature had completed its task and adjourned, and then veto its work and force another legislature to attack the same problem without any information as to why the veto had been exercised. And yet the American people, who pride themselves on their efficiency and common sense, require or permit their courts to be run on just this plan.

If the jury is to be employed at all in civil litigation, its activity should be restricted to the finding of special issues or special verdicts. There was no general common-law requirement that juries should have anything to do with matters of law, as they necessarily do have when they render general verdicts. The parties could always prevent the jury from coming in contact with the law of the case by demurring to the

evidence, and the jury could always decline to meddle with the law by rendering a special verdict. Issues of fact, on the other hand, could not by any procedural device be withdrawn from the jury, which makes it clear that the primary and essential function of the jury was to determine the facts, not to apply the law. Statutes which take away the jury's common-law right to elect between a general and special verdict, and force them, on the request of either party, to render a special verdict, do not, therefore, impair the fundamental character of trial by jury, and have been held constitutional.[33]

The procedural weaknesses of the general verdict are two. In the first place, it allows laymen to deal with matters with which they are entirely unfamiliar and which they will necessarily remain largely ignorant in spite of all the judge may tell them, and there is no way of knowing in any case whether or to what extent the jury misunderstood the law or whether or to what extent they misapplied it. In the second place, the particular facts completely lose their identity in the general finding, so that if error occurs it vitiates the whole verdict. The jury will not be permitted to testify as to how they compounded it, and there is accordingly no way in which errors can be localized, enabling the sound portions to be saved. This is a highly uneconomical arrangement, and causes an enormous loss of effort. Both of these weaknesses are entirely avoided in the special verdict.

Texas stands in an almost unique position in regard to this problem of the verdict, having substantially abolished the general verdict in civil cases and substituted special issues. All states must eventually come to this practice, for the general verdict is the most prolific source of error and the most far-reaching cause of reversals and new trials known to procedural law.

Looking over the field of trial practice, it is quite apparent that neither the rules of pleading, nor the rules of evidence, nor the rules for obtaining or dealing with the jury, are rules of precision, but are rules of approximation only; and that determining the merits of a lawsuit, like the selection of the best candidate for an office is a complex social and not a simple logical problem. Hence technical tests are only a delusion and a snare, and are more likely to disturb than to promote the course of justice. An instinct for social service will carry both the lawyer and the judge much farther than an instinct for that emptiest of all abstractions—procedural logic.

Edson R. Sunderland.
University of Michigan.

[33] Udell v. Citizens St. Ry., 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336 (1898).

A Defect of Statutory Procedure

Our reformatory attempts have been along another and a different line. We have enacted new statutes, codified and recodified our laws on this subject until today we have a system of commercial law very largely inflexible in character so that it can not grow with the developing customs of merchants, and requiring the determination of disputes not upon merits or justice of the cause, but upon the construction which is placed upon statutory provisions often badly drawn or ineptly expressed.

As an example, take a single illustration—an action to recover on a bill of goods. It is one of the oldest actions known to the law and, instead of presenting a question which is simple, it presents a question which is complex. Owing to the complexity of modern statutes, great care must be exercised to ascertain whether the title to the goods has actually passed, because upon the determination of this question will depend whether the action must be for price or for damages.

A vast body of rules interpreting these statutes has grown up so intricate in character that no merchant can

understand them, and which the courts can only apply in an artificial way. Many of these provisions are unnecessary. The merchant ought to be able to present his bill, allege that it has not been paid, and our courts ought to be placed in a position where they can determine whether or not the plaintiff is entitled to recover. Distinctions between actions for price and actions for damages, and a host of other distinctions, which our statutes prescribe, have nothing to do with the justice of the cause.

The courts are not to be blamed for this situation. They have done their best to make poorly drawn statutes work. The law has been embodied in statutory form and the judges are not permitted to apply either the rules of common sense or of justice, but are instructed to apply the rules which the legislature has enacted. Statutory enactments on subjects of this nature have done more harm than good. Further progress is to be made not by enacting more statutes, but by repealing some of those that we have and freeing our courts from legislative restrictions so that they may have the power to do justice.—*Samuel Seabury, Pres., N. Y. Co. Lawyers' Association, in Commercial Law Journal, Vol. XXXII, No. 1.*

Legal Aid in Criminal Cases

Gift of $150,000 to Northwestern University School of Law by Mrs. Anna L. Raymond Permits of Extending Legal Aid to Indigents in Chicago's Courts

Legal aid work in Chicago receives a very great stimulus through the gift recently of $150,000 to Northwestern University by Mrs. Anna L. Raymond, establishing the "James Raymond and Anna Louise Raymond Foundation." By the aid of that portion of the income immediately available Northwestern University School of Law has established the "Criminal Courts Branch of the Legal Aid Clinic." The Law School has for several years maintained a legal aid clinic in civil cases in conjunction with the Legal Aid Bureau of the United Charities. The word "clinic" is properly used because no student of the Law School receives a diploma who has not devoted the required number of hours to this work, under a director who is a faculty member and a successful practitioner.

The new organization permits of like work by students in the defense of poor persons accused of crime. This does not mean that full responsibility rests upon students. The Chicago Bar Association has a committee of volunteer members who are assigned to the defense in specific cases and are assisted by students designated by the managing attorney, who works under authority of a board composed of the chairman of the bar association committee, the superintendent of the United Charities, a member of the Law School faculty and the superintendent of the Central Howard Association.

The essence of the plan lies in the practical assistance afforded to bar association volunteers by students, who interview the accused in jail, look up evidence, search the authorities, attend the trial and assist generally as juniors in preparation and trial. The assistance thus rendered enables many bar members to give their responsible services who otherwise could not afford the time. The whole plan of course operates under

the law which provides for the appointment of counsel to defend indigent persons and avoids the necessity for the appointment of lawyers who merely chance to be in the court room when the judge makes the appointment. Under the new system the judges select from the bar list and the managing attorney co-ordinates the work from that stage. As the work expands and the means permit the staff will assume similar work in the police branches of the municipal court.

An explanation of the policy involved is stated in a Northwestern University Bulletin as follows:

> The purpose of the Criminal Courts Branch of the Legal Aid Clinic is to secure adequate assistance of counsel for persons who are too poor or too ignorant to obtain such aid otherwise. The legitimate scope of such assistance is to secure the presentation of all the facts to the court, to offer such considerations of law and justice as arise from those facts, and to propose a fair disposition of the case on the law and the facts. For this purpose, the labor of a disinterested but active and zealous advisor is necessary, in most criminal cases in large cities. The poor and the ignorant are especially liable to be imposed upon by a few incompetent or mercenary attorneys, who render no real service and exact exorbitant fees from family and friends. The Legal Aid Clinic aims not to take over from others any legitimate practice in the criminal courts, but to render honorable service where none could have been had, and to compete only with pettifoggers.
>
> Following the well vindicated experience of the New York Volunteer Defenders' Society, the Criminal Clinic adopts a semi-judicial attitude in its preliminary investigation of the facts and the law. If its agents conclude that a trial in court would be a waste of time and money for the state, either because the charge is clearly and fully established or because the accused is clearly and wholly guiltless, it confers with the state prosecutor, in order to secure a suitable disposition of the charge without trial in court. By this practice it considers itself to be doing its duty alike to the state and to the accused, and to be helping to improve the administration of justice and to maintain the best standards of honor at the bar.

Remedy Proposed for Justices' Courts

Problem of Making Justices of the Peace Responsible a Simple One—Higher Judge Should Supervise Their Work—Fixed Salary Needed

Commenting upon the recent case of Tumey v. State of Ohio[1] wherein it was held that a magistrate having a direct financial interest in the assessment of a fine could not lawfully try an accused person, Mr. Blewett Lee, in American Bar Association Journal for May, expresses the hope that the decision will lead to a cure of the evil involved in making justices of the peace dependent upon their decisions for their fees, as they must be in cases in which the losing party is impecunious. This dependence is a real evil but it is not the only evil ascribable to the office of justice. Good character is more easily found than knowledge of the law.

[1]No. 527, Oct. Term, 1926, U. S. Sup.

It has been generally assumed that there was no way to provide justice in small causes in rural districts. But there is a very simple way to accomplish that—simple if one does not take into consideration political opposition. All that is needed is to have justices appointed, to pay them salaries, and to put them under the supervision of a real judge. With modern means for transportation only a few are needed in the average county. They should have power to issue warrants, to try misdemeanors involving fines of a small amount, and to try civil causes under certain limitations. For instance, they might well try cases involving up to $500 by consent of both parties. In the

absence of consent the case should be removed to the county seat. There should also be provision for a change of venue on showing made to the county or district judge. The justices should be deputies of the county judge to the extent of their powers and should be supervised by him. This relationship would be furthered by providing that they be appointed by him with the consent of the county board. If there be no county judge a district judge could be made responsible for supervising the people's intimate courts. There is no problem in judicial administration or in political organization more readily solved, on paper. A full explanation of the plan was printed in the JOURNAL, Vol. III, No. 1, copies of which are obtainable.

A sensible comment upon the office which is so general and so important and at the same time so commonly in disrepute, clipped from the columns of Law Notes, follows:

Time was when the justice of the peace was a leading figure in every community. He was ex officio adviser in difficulties both financial and domestic. Even when he proceeded officially there was rarely an appearance by counsel and still more rarely an appeal, so that in minor matters he was to all intents and purposes the final arbiter, little short of the celebrated Roy Bean whose sign read "Cold Beer and Law West of the Pecos." He drew deeds and wills (the reported cases show in what manner), performed marriages and generally administered in feudal manner the low justice, with occasional incursions into the middle and the high. But the ruthless hand of progress has shorn him of most of his prerogatives. As lawyers multiplied the legal profession absorbed his advisory functions and the proceedings in justice court are usually conducted by lawyers or clerks from our offices. As a relic of the past, there is in most states no requirement that a justices of the peace must be lawyers As a consequence under modern conditions he is an inefficient instrument. In matters of importance an appeal to a court of record is almost a matter of course, and in cases too small to be worth an appeal there is a general feeling of dissatisfaction. The old time justice has outlived his usefulness; he is a bit of economic waste. On the other hand, there is rapidly developing the idea of a "small causes court" conducted on intelligent lines to make justice cheap, speedy and easy of attainment in the minor frictions of life. This idea has not yet developed outside the large cities, but given competent magistrates to administer it, it could helpfully be adapted to use in small communities. Legal training is no absolute assurance of competency for such a magistracy, but certainly no other single requirement would go so far toward securing competence. If it were provided that all Justices of the Peace must be lawyers of at least five years' standing, it would be possible to make their judgments final in a considerable class of cases, and permit the introduction of some system of conciliatory hearings. Justice would be better and more cheaply administered. It cannot be said too often that in reality there is no such thing as an "inferior court." The courts whose jurisdiction is confined to small controversies and petty offenses touch closely the lives of the great number who have no large controversies and are not accused of serious crimes. A ten dollar judgment against a laborer is as important to him as a ten thousand dollar judgment is to a railroad company, and he is entitled to a judgment competently rendered according to the law. It is in small causes and not in large ones that respect for law is made or unmade. The time has come when we should recognize that the administration of justice should not be a side issue of a real estate office just because the amount involved in any one case is small.—Law Notes; Vol. XXIX, No. 10.

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